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No. 88-240

In The
Supreme Court of the United States
October Term, 1987

GAF CORPORATION,

Petitioner,

v.

ROSEMARIE ERICH, CONCEPCION REIDER, and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

REGULATION CITED

OTHER AUTHORITIES CITED

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Pertinent provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") are set forth in Petitioner's Appendix found at P21a. Additional sections relied upon by Respondents

herein are set forth in the Appendix hereto. The pertinent section of the United States Department of Labor (DOL) Regulation, 29 C.F.R. § 2510.3-1 is set forth in Petitioner's Appendix E, at 31a-36a.

ARGUMENT

POINT I. THE ISSUE OF FEDERAL PREEMPTION WAS NOT ARGUED TO OR DECIDED BY THE NEW JERSEY SUPREME COURT.

GAF suggests that two questions are presented for consideration by its Petition for Certiorari. First is the issue of whether ERISA preempts state laws relating to an employer administered plan providing for vacation benefits payable from the employer's general assets. Petitioner then poses the question of the appropriate standard of judicial review under ERISA of an employer-administrator's interpretation of such a plan.

The issue of the appropriate standard of review is not, however, reached unless it is first affirmatively determined that ERISA applies to an unfunded vacation plan, *and* that a regulation of the United States Department of Labor (DOL) specifically excluding such plans from the coverage of ERISA is invalid.[1] This threshold issue of federal preemption as well as the issue of the validity of the DOL regulation were not argued to nor decided by the New Jersey Supreme Court. As such they do not provide a sound basis upon which to grant certiorari. *Illinois v. Gates*, 462 U.S. 213 (1983), *reh'g. denied*,

1. 29 C.F.R. § 2510.3-1.

463 U.S. 1237 (1983); *see general'y, State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950).

The statutory and regulatory framework within which the preemption issue must be viewed is as follows: 29 U.S.C. § 1144 provides that ERISA "supercede[s] any and all State laws insofar as they may relate to any employee benefit plan." "Employee benefit plans" include any "employee welfare benefit plan," *id.* § 1002(3), defined as "any plan, fund, or program . . . established or maintained . . . for the purpose of providing . . . vacation benefits." *Id.* § 1002(1). Shortly after the enactment of ERISA, the United States Department of Labor adopted clarifying regulations which provide in part that there shall be excluded from the definition of "employee welfare benefit plans" various "payroll practices" including the "[p]ayment of compensation, out of the employer's general assets . . . while an employee is on vacation." 29 C.F.R. § 2510.3-1(b)(3) (1983) P31a. GAF's vacation program falls within this regulation. If the regulation is valid, the plan is not within ERISA, and consequently not subject to its preemption provisions. This would permit a state court to evaluate GAF's actions under applicable state employment relations law.[2]

The trial court below requested that the issue of federal preemption be briefed and argued incidental to a then pending motion to certify this matter as a class ac-

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2. Respondents draw heavily in their recitation of the statutory and regulatory framework from the opinion of the court in *California Hosp. Assn. v. Henning,* 770 F. 2d 856, 858 (9th Cir. 1985), *opinion modified* and *reh'g denied* 783 F. 2d 946 (9th Cir. 1986), *cert. denied,* 477 U.S. 904 (1986), *reh'g denied* — U.S. —, 107 S. Ct. 12 (1987). In that case the issue of the validity of the DOL regulation, which was upheld, was the "sole question." 770 F. 2d at 858.

tion. P17a. In response thereto GAF supported the validity of the DOL regulation arguing that the DOL decision to exempt unfunded vacation plans from the coverage of ERISA was an administrative interpretation of a statute by the governmental agency responsible for its enforcement, and as such entitled to great weight.[3] Such an argument was consistent with GAF's view that its vacation policy was not covered by ERISA, and its conceded failure to comply with any of the reporting or disclosure requirements thereof.[4]

GAF's position was rejected by the trial court which relying upon the subsequently reversed Federal District Court opinion in *California Hosp. Assn. v. Henning*, 569 F. Supp. 1544 (C.D. Cal. 1983)[5] found the DOL regulation invalid, and accordingly, that state law was preempted. P18a-19a. GAF did not seek appellate review of this decision, and in fact for whatever reason each party may have had, the case thereafter proceeded on the assumption and tacit agreement that federal law applied. The issue of the validity or invalidity of the DOL regulation was not addressed or argued in either the intermediate appellate court or in the New Jersey Supreme Court. It now reappears in GAF's Petition, with GAF arguing that the Regulation is invalid as it is inconsistent with the plain language and intent of ERISA. P10. GAF has now argued in the same case that the DOL regulation is both valid and invalid. A party should not be permitted to unilaterally develop an issue for

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3. Brief of Defendant, GAF, in the Superior Court of New Jersey, Law Division, p. 5-6 (Jan. 4, 1985).

4. See Certification of GAF's Vice Chairman James Sherwin. Plaintiff's Appendix below, p. 342a-343a.

5. See note 2 *supra*.

review by advocating both sides of it at different stages of the litigation.

The failure of the parties to litigate the issue of federal preemption was specifically noted by Justice O'Hern in writing for a unanimous New Jersey Supreme Court where he stated that, "This case presents an unusual analytical exercise in that both parties have argued before us that this matter is to be decided under federal law despite a divergence in federal precedent regarding the issue . . . and despite a federal regulation expressly disclaiming ERISA preemption of vacation pay benefits . . ." P2a.

The New Jersey Supreme Court then went on to deftly avoid deciding the preemption issue by holding that, "Without suggesting that we are bound by the stipulation of the parties, we find that the policies that favor non-preemption in this area of employer-employee relations support a broader standard of review under either state or federal law." *Ibid.*

Should the foregoing leave any doubt that the New Jersey Supreme Court did not intend to *decide* the preemption issue in this case, one need only consider the following passage from its opinion. After citing and quoting a Columbia Law Review Note[6] on the precise issue, the court announced that although it felt one way, the state of the record dictated that it proceed otherwise: "Hence, we agree that it is probably incorrect to assume that Congress intended that issues of vacation pay should become issues of federal law. But since the parties have argued the case on the basis that the vacation pay issue is preempted by

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6. Note, *Unfunded Vacation Benefits: Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702 (1987).

ERISA, we must consider how courts would review such matters under federal law." P7a.[7]

It makes little difference whether a decision by the New Jersey high court on the preemption issue is considered a jurisdictional prerequisite or merely a sound precedential requirement for the exercise of discretion in granting a writ of certiorari. See *Illinois v. Gates, supra; Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Beck v. Washington*, 369 U.S. 541 (1962). Where, as here, the highest state court expressly indicates that it is not deciding the issue, in part because the parties did not argue it in an adversarial context, granting certiorari is inappropriate. The mere presence in a case of an important issue does not support granting the writ. *State of Maryland v. Baltimore Radio Show, supra.*

GAF for the first time sets forth in considerable detail in its petition the authority and precedent which supports its current position on the issue of federal preemption and the validity of the DOL regulation. P6-15. Coming at this time these arguments are too late for the state court proceeding and premature of this Court's consideration. As such a substantive rebuttal is inappropriate. Failure to press, brief or argue these issues in either the Appellate Division of the Superior Court or the New Jersey Supreme Court creates a significant void in the record below. Under such circumstances to grant certiorari would be a deviation from this Court's traditional

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7. By accepting the joint position of the parties that federal law applied, the New Jersey Supreme Court was able to finesse the issue of the validity of the DOL Regulation. 29 C.F.R. § 2510.3-1.

appellate philosophy. As stated by Justice Frankfurter, "Wise adjudication has its own time for ripening." *Id.* at 918.

POINT II. THE NEW JERSEY SUPREME COURT'S DECISION ON THE STANDARD OF REVIEW ISSUE IS LIMITED TO THIS CASE AND IS NOT PRECEDENTIAL IN FUTURE ERISA CASES.

After accepting, without deciding, the correctness of the litigant's position that federal law applied to unfunded vacation benefit plans, the New Jersey Supreme Court proceeded to determine the appropriate standard of judicial review of employer determinations thereunder. Recognizing a split in authority on the subject, the court rejected the "arbitrary and capricious" standard suggested by GAF and opted for a standard less deferential to the employer-administrator and requiring a broader inquiry under principles of contractual construction. P8a. More specifically, what the court did was to adopt the standard enunciated in *Bruch v. Firestone Tire and Rubber Co.*, 828 F. 2d 134 (3rd Cir. 1987), *cert. granted*, 485 U.S. —, 108 S. Ct. 1288 (1988). By adopting the *Bruch* standard, the New Jersey court avoided the undesirable effect of having the outcome of a New Jersey case involving an unfunded benefit determined by choice of forum. The court further indicated that it had no problem adopting the employment contract law theory as that was consistent with New Jersey law. However, the court sent a strong message that although it was accepting the position of the parties and deciding this case under federal law, in a case where the issue is properly presented, it might well favor non-preemption.

Bruch is not a vacation benefit case and as a result the validity of the DOL Regulation is not in issue. Therefore, this Court's pending resolution of the existing conflict as to the proper standard of review in unfunded benefit cases such as *Bruch,* will not be dispositive of unfunded *vacation* benefit cases. The resolution of that issue must await an appropriate case such as *California Hosp. Assn. v. Henning, supra,* where the validity of the DOL exclusionary regulation was both pressed and passed upon below. See *Illinois v. Gates, supra.* Interestingly, this Court declined to review the California Supreme Court's decision upholding the DOL Regulation.[8]

Once this Court decides the appropriate standard for review of unfunded benefit plans preempted by ERISA, which is the issue present for review in *Bruch, supra,* not only will the lower federal courts be bound thereby, but the state courts as well. *State v. Coleman,* 46 N.J. 16 (1965). Therefore, this case does not properly present any issue for decision which is not already under review by this Court.

POINT III. PETITIONER'S FAILURE TO ACT AS A FIDUCIARY UNDER ERISA NEGATES THE ISSUE OF THE PROPER STANDARD OF REVIEW OF A TRUE FIDUCIARY.

Assume for purposes of this argument that the New Jersey Supreme Court, instead of accepting the position of the parties on the subject, as it recited, actually decided the issue of choice of law in favor of preemption. Assume further that it intended to decide *sub silentio* that

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8. See note 2 *supra*

the DOL regulation exempting unfunded vacation plans from ERISA was invalid. Difficult as it may be to accept these assumptions, Petitioner urges them on this Court in order to provide a foundation for its argument that the issue of the proper standard for review of the decisions of an ERISA plan fiduciary is presented by this case and ripe for review. Respondents respectfully disagree.

Even accepting GAF's assumptions postulated above, the facts of this case only present the narrower question of the scope of review of decisions of one who should have been, but did not assume a fiduciary role in rendering benefit decisions.[9] GAF has conceded that it had not met any of ERISA's obligations with respect to benefit plans because it ". . . never believed that its vacation guideline constituted an employee welfare plan within the meaning of [ERISA] . . ."[10] GAF had not prepared a "written instrument" meeting the requirements of ERISA § 402, 29 U.S.C. § 1102; GAF had not prepared and distributed to its employees a "summary plan description" for its vacation policy as required by ERISA § 102, 29 U.S.C. § 1021; GAF had not prepared annual reports with respect to the plan as required by ERISA § 103, 28 U.S.C. § 1023; and GAF had not established a procedure to

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9. So stated, the issue resembles that present in the *Bruch* case, *supra*, and GAF's conduct parallels to a great extent the employer, Firestone's behavior in that case. Counsel herein has adapted a portion of Respondent's very persuasive brief in that case in support of this Point III of the Argument. *Bruch v. Firestone Tire and Rubber Co., supra*, Respondent's Brief in the Supreme Court of the United States, No. 87-1054.

10. Sherwin Certification, *supra*, note 4.

enable those whose vacation pay claims were denied a "full and fair review" as required by ERISA § 503, 29 U.S.C. § 1133. Finally, GAF did not appoint "named fiduciaries . . . to control and manage the operation and administration of the plan." ERISA § 402, 29 U.S.C. § 1102.

In the absence of a named fiduciary to administer the plan, GAF, by operation of law, became the administrator, see ERISA §3(16)(A)(ii), 29 U.S.C. § 1002(16)(A)(ii), and, by further operation of law, GAF became a fiduciary with respect to its vacation pay plan, see ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). GAF complied with none of the above cited ERISA requirements nor administered its vacation plan as an impartial fiduciary for the simple conceded reason that it relied upon the DOL Regulation that excludes vacation plans.[11] GAF now argues that certiorari should be granted in order that this same regulation may be declared invalid. P9.

In believing it was not a fiduciary, and therefore not conducting itself as such, GAF has deprived itself of any protection which ERISA or the relevant portions of the Labor Management Relations Act, 1947 afford to a plan fiduciary, or for that matter any law applicable to an impartial trustee.[12] More significantly, it has effectively eliminated from this case any issue relating to the scope of review of decisions of one who actually acts as a fiduciary.[15]

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11 *Ibid.*

12. See ERISA § 404, 29 U.S.C. § 1104; Labor Management Relations Act, 1947, § 302, 29 U.S.C. § 186.

13. *Blau v. Del Monte Corp.*, 748 F. 2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 856 (1985).

It must be emphasized that this case was decided below on a motion for summary judgment and without the benefit of a trial. It is entirely conceivable that in the forthcoming trial of this case on remand a trial judge may at the very least request to hear testimony on the factual issue of whether GAF conducted itself as a fiduciary. The mere existence of this possibility further supports Respondents' position that this case fails to present issues which are currently ripe for determination by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Statutory Provisions

Employer Retirement Income Security Act of 1974 ("ERISA") 29 U.S.C. § 1001 *et seq.*

ERISA § 3, 29 U.S.C. § 1002. DEFINITIONS

For the purposes of this subchapter:

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 102, 29 U.S.C. § 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries

The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025(a) and (c) of this title.

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor

The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

* * * * *

ERISA § 103, 29 U.S.C. § 1023. Annual reports

(a) Publication and filing

(1)(a) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section

1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

* * * * *

ERISA § 402, 29 U.S.C. § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * * * *

ERISA § 503, 29 U.S.C. § 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

* * * * *